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In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRANSPORTATION MANAGEMENT CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158 (a)(3), if its hostility to an employee's protected union activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities.

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v.

TRANSPORTATION MANAGEMENT CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–8a) is reported at 674 F.2d 130. The decision and order of the National Labor Relations Board (App. C, *infra*, 10a–16a) and the decision of the administrative law judge (App. D, *infra*, 17a–45a) are reported at 256 N.L.R.B. No. 25.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 9a) was entered on April 1, 1982. On June 18, 1982, Justice Brennan extended the time for filing a petition for

a writ of certiorari to and including July 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies

> of this [Act]: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

STATEMENT

1. Respondent provides transportation services to various local school boards in Massachusetts (App. D, *infra*, 18a). On Monday, March 19, 1979, Sam Santillo, a school bus driver employed by respondent, visited union offices with a fellow employee and met union officials. They discussed union representation for respondent's drivers, and Santillo signed an authorization card designating the union as his collective-bargaining representative (*id.* at 19a). During the following week Santillo spoke to a number of fellow employees about the union, learned that some were interested, and obtained and distributed additional authorization cards. Several of the cards were signed and returned to him (*ibid.*). On Saturday, March 24, Santillo telephoned nearly all the drivers and told them of a union organizational meeting scheduled for Monday evening, March 26 (*id.* at 24a).

During the same week, beginning on March 22, George Patterson, respondent's area manager in Santillo's area, conducted what the Board found to be "an extensive campaign of interrogating a number of employees about their union activities" (App. D, *infra*, 23a; see App. C, *infra*, 10a–11a), and "ascertained that Santillo was one of the prime organizers of the union campaign" (App. D, *infra*, 23a). At one point, Patterson told employee Baer that he had learned of Santillo's involvement with the union, that Santillo was two-faced, and "that he was going to get even with Santillo" (*id.* at 20a). Patterson also asked employee

West, who was Santillo's brother-in-law, "'What's with Sam and the Union?'"; when West gave a noncommittal response, Patterson said that he took Santillo's activities "'personal,'" referred to certain favors he had extended to Santillo in the past, and said that he would remember Santillo's union activities when Santillo sought such favors in the future (*ibid.*). On Saturday morning, Santillo, having learned of Patterson's statements, telephoned Patterson; both were conciliatory, but Patterson said that when Santillo came to work on Monday, Patterson would "have to pretend in front of other employees that he was mad at Santillo" (*id.* at 21a).

The following Monday, March 26, Patterson fired Santillo "for leaving his keys in the bus, and taking unauthorized breaks" (App. D, *infra*, 24a). Santillo asked for the reasons in writing; after discussing Santillo's union involvement by telephone with respondent's President, Patterson refused this request. When Santillo said he would challenge his firing, Patterson said: "'By the way this has nothing to do with the Union'" (*id.* at 25a).

2. The Board, upholding the decision of the administrative law judge, found that respondent had violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), which makes it an unfair labor practice for an employer "by discrimination in regard to * * * tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[1] To reach this conclusion the

[1] Respondent's violation of Section 8(a)(3) also constituted a violation of Section 8(a)(1). In addition, the Board upheld the administrative law judge's conclusion that respondent violated Section 8(a)(1) by threatening and coercively interrogating employees and by creating the impression that employees were under surveillance because of union activities (App. D, *infra*, 40a; see App. C, *infra*, 10a–11a). The court of appeals sustained these conclusions (App. A, *infra*, 6a) and we present no issue concerning them.

Board applied the test it articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982). There the Board explained that in determining whether an employer's action violated Section 8(a)(3), it would first require the General Counsel to show that the employee's protected activities were a "motivating factor" in the employer's decision to take adverse action against the employee. If the General Counsel made this showing, the Board ruled—explicitly following this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)—that the employer could avoid an unfair labor practice finding only if it proved, by a preponderance of the evidence, that the adverse action would have been taken even if the employee had not engaged in protected activities. 251 N.L.R.B. at 1089.

Here, the Board concluded, the General Counsel established that respondent "evidenced a strong union animus" and that it "had knowledge of Santillo's union activity and * * * intended to retaliate against Santillo because of" his union activities (App. C, *infra*, 12a). The Board accordingly found that the General Counsel had "established by strong and credible evidence a *prima facie* case for finding that Santillo was discharged in violation of Section 8(a)(3)" (*ibid.*).

The Board then considered whether respondent "has shown, by other evidence, that Santillo's discharge would have occurred without regard to these considerations" (App. C, *infra*, 12a). The first reason respondent offered for discharging Santillo was that he left his keys in his bus; the Board noted that it was common practice for drivers to leave their keys in the buses and that Patterson had decided to discharge Santillo before he learned that Santillo left his keys in the bus on the day of the discharge. It therefore concluded that this was a

"purely pretextual reason which does more to detract from the lawfulness of the discharge than support it" (*ibid.*). Respondent's second alleged reason was that Santillo took unauthorized coffee breaks; the Board found that "this was a normal practice among the drivers" and that it was "tolerated unless [it] * * * adversely affected the driver's job performance," in which case respondent might take some nondisciplinary action, such as changing the driver's route. But the Board found that no driver had ever been disciplined—"much less * * * suspen[ded] or discharge[d]"—for this reason (*id.* at 12a–13a).

The final reason offered by respondent was that Santillo made unauthorized stops at his home. The Board acknowledged that respondent did not condone this practice. But the Board found that respondent did not confront Santillo with the evidence of this unauthorized practice, warn him of the possible consequences, or "follow its regular procedure of three written warnings before discharge" (App. C, *infra*, 13a). The Board therefore concluded that respondent had not "establish[ed] * * * that Santillo would have been discharged, even absent his union activities" and accordingly had not rebutted the General Counsel's case (*ibid.*). The Board ordered Santillo reinstated with back pay (*ibid.*; see App. D, *infra*, 42a).

3. The court of appeals refused to enforce the Board's order on the ground that the Board's *Wright Line* test is inconsistent with the National Labor Relations Act (App. A, *infra*, 3a). Specifically, the court of appeals held that, even if the General Counsel had shown by a preponderance of the evidence that an impermissible motive underlay respondent's decision, respondent had only the burden of *producing evidence* that it would have taken the same action for permissible reasons. The court rejected the Board's *Wright Line* test insofar as that test places on an employer, shown to have acted

for an impermissible reason, the burden of *proving by a preponderance of the evidence* that it would have taken the same action for legitimate reasons. See App. A, *infra*, 3a, citing *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981). Apparently concluding that the distinction between the burden of production and the burden of proof or persuasion may have affected the outcome in this case,[2] the court remanded the case to the Board for reconsideration under the standard it had specified (App. A, *infra*, 3a).

REASONS FOR GRANTING THE PETITION

The question presented in this case is of considerable practical importance to the administration of the National Labor Relations Act, and the decision of the court of appeals squarely conflicts with the decisions of five other courts of appeals. Moreover, the court of appeals erred in rejecting the Board's considered interpretation of the Act—a long-standing interpretation that has been specifically endorsed by Congress and is consistent with this Court's decisions in analogous areas. Review by this Court is therefore warranted.

1. An employer violates Section 8(a)(3) if it takes adverse action against an employee that is motivated by hostility to the employee's protected union activities. In *Wright Line*, the Board, noting some uncertainty about the meaning of earlier formulations, "set forth formally a test of causation for cases alleging violations of Section 8(a)(3)" (251 N.L.R.B. at 1083). The Board did so

[2] The court first expressed its criticisms of the Board's *Wright Line* test in the proceedings to review the *Wright Line* order. *NLRB* v. *Wright Line*, *supra*, 662 F.2d at 904–907. But because the court believed that the aspect of the test it rejected was not material to the outcome of *Wright Line* itself, it enforced the Board's order. *Id.* at 907–909. See also *Heartland Food Warehouse* v. *NLRB*, No. 81–1592 (June 1, 1982), slip op. 4.

in part because of the need to "provide litigants and the decisionmaking bodies with a uniform test" (*id.* at 1089) in the large number of Section 8(a)(3) cases.[3]

Initially every court of appeals that considered the question, including the First Circuit, approved the Board's *Wright Line* test. See *Statler Industries, Inc.* v. *NLRB*, 644 F.2d 902, 905 (1st Cir. 1981); *NLRB* v. *Robin American Corp.*, 654 F.2d 1022, 1025 (5th Cir. 1981), modified on other grounds, 667 F.2d 1170 (1982); *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 446 (6th Cir. 1981); *Peavey Co.* v. *NLRB*, 648 F.2d 460, 461 (7th Cir. 1981); *NLRB* v. *Nevis Industries, Inc.*, 647 F.2d 905, 909 (9th Cir. 1981). Indeed, the First Circuit specifically addressed the burden of proof issue and endorsed the Board's approach, disclaiming contradictory language in an earlier opinion. See *Statler Industries, Inc.* v. *NLRB*, *supra*, 644 F.2d at 905–906 n.4. Then in *NLRB* v. *Wright Line*, *supra*, the First Circuit explicitly changed direction again (see 662 F.2d at 905 n.10) and held that the Board's test improperly allocated the burdens of proof. That holding was the basis for its refusal to enforce the Board's order in this case. The Third Circuit has agreed with the First Circuit on this point. *Behring International, Inc.* v. *NLRB*, 675 F.2d 83, 86–90 (3d Cir. 1982).

The Eighth and Ninth Circuits have expressly disagreed with the First Circuit's decision in *Wright Line* and have endorsed the Board's approach instead. See, *e.g.*, *NLRB* v. *Senftner Volkswagen Corp.*, No. 82–1032 (8th Cir. July 8, 1982), slip op. 4–5; *Zurn Industries, Inc.* v. *NLRB*, Nos. 81–7219 and 81–7331 (9th Cir. July 2, 1982), slip op. 2877–2884.[4] The Eighth Cir-

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[3] Section 8(a)(3) violations were alleged in 58.5% of the 31,281 cases against employers brought before the Board in fiscal 1980. 45 NLRB Ann. Rep. 243 (1981).

[4] In his concurring opinion in the court below, Judge Breyer acknowledged the conflict among the circuits. App. A, *infra*, 6a–7a & n.2.

cuit said: "We have considered the First Circuit's criticisms of the [Board's] *Wright Line* analytical framework and believe they are not well taken." *NLRB* v. *Fixtures Manufacturing Corp.*, 669 F.2d 547, 550 n.4 (1982). Moreover, the Sixth Circuit has noted that "[i]n numerous decisions since the promulgation of the *Wright Line* test, this Court has accepted the Board's burden shifting formula as proper." *Republic Die & Tool Co.* v. *NLRB*, No. 81–1734 (June 15, 1982), slip op. 3 (collecting cases). See also *Borel Restaurant Corp.* v. *NLRB*, 676 F.2d 190, 192–193 (6th Cir. 1982). The Fifth and Seventh Circuits have also upheld the Board's approach. See *NLRB* v. *Berger Transfer & Storage Co.*, 678 F.2d 679, 691–692 (7th Cir. 1982) ("If a causal relationship between the discharge and protected activity is established, the employer is responsible under the Act unless he sustains his burden of proof."); *Red Ball Motor Freight, Inc.* v. *NLRB*, 660 F.2d 626, 627–628 (5th Cir. 1981), cert. denied, No. 81–1605 (May 24, 1982); *NLRB* v. *Charles H. McCauley Associates, Inc.*, 657 F.2d 685, 688 (5th Cir. 1981).[5]

We opposed certiorari in earlier cases in which the Board applied the *Wright Line* test, including *Wright Line* itself. See *Wright Line* v. *NLRB*, cert. denied, No. 81–987 (Mar. 1, 1982); *Pettibone Corp.* v. *NLRB*, petition for cert. pending, No. 81–2116 (filed May 17, 1982); *Red Ball Motor Freight, Inc.* v. *NLRB*, *supra*.

[5] The Second, Tenth, and Eleventh Circuits have acknowledged the Board's test but have not had occasion to rule on its validity. See *NLRB* v. *Charles Batchelder Co.*, 646 F.2d 33, 38–39 (2d Cir. 1981); *NLRB* v. *Carbonex Coal Co.*, 679 F.2d 200 (10th Cir. 1982); *Weather Tamer, Inc.* v. *NLRB*, 676 F.2d 483, 491 n.4 (11th Cir. 1982). The Fourth Circuit, after suggesting approval of the Board's *Wright Line* test (*B.E. & K., Inc.* v. *NLRB*, No. 80–1730 (Oct. 20, 1981), slip op. 11–12 & n.6), has indicated that the question is still open. See *Cedar Coal Co.* v. *NLRB*, 678 F.2d 1197, 1199 n.4 (4th Cir. 1982).

In those cases, however, the General Counsel had proved that the only legitimate reasons advanced by the employer for its action were pretexts. See 81-987 Br. in Opp. 8-9, 11-12; 81-2116 Br. in Opp. 6; 81-1605 Br. in Opp. 8. Consequently, the employer would not have been entitled to relief even under the First Circuit's approach. Here, however, the Board found that respondent did not carry his burden of persuasion, and the court of appeals—while not overturning that finding—declined to enforce the Board's order because it believed that the Board erred by assigning respondent more than a burden of production. This case, therefore, squarely presents a "conflict on what is obviously a recurring issue that should be resolved" (*Red Ball Motor Freight, Inc.* v. *NLRB*, *supra* (White, J., dissenting from the denial of certiorari)).

2. The legislative history of the Act shows that the court of appeals erred; indeed, Congress specifically addressed the issue on which the court of appeals disagrees with the Board and resolved it in the way reflected by the Board's *Wright Line* test.

Soon after the Act was passed, the Board, in applying Section 8(a)(3), adopted the view that where "a substantial motive for the discharge[ ] was the [employer's] desire to thwart the nascent Union[, a] violation is * * * established whether or not the [employer] may have had some other motive in addition * * *." *The Dow Chemical Co.*, 13 N.L.R.B. 993, 1023 (1939), enforced in relevant part, 117 F.2d 455 (6th Cir. 1941). The Board adhered to this rule through the time of the Taft-Hartley amendments to the Act (Labor Management Relations Act, ch. 120, 61 Stat. 136) adopted in 1947. See, *e.g.*, *Republic Creosoting Co.*, 19 N.L.R.B. 267, 294 (1940); *United Dredging Co.* 30 N.L.R.B. 739, 766 n.24 (1941); *Lone Star Gas Co.*, 52 N.L.R.B. 1058,

1060 (1943); *John W. Campbell, Inc.*, 58 N.L.R.B. 1153, 1162–1163 (1944); *Carl L. Norden, Inc.*, 62 N.L.R.B. 828, 831 n.11 (1945).

At the same time, however, the Board stated that an employer whose action was in part impermissibly motivated could avoid a finding of an unfair labor practice by showing that it would have taken the same action in the absence of the impermissible motive; but the Board made it clear that, in such a situation, the burden of persuasion was on the employer. As the Board explained (in a case in which an employer was charged with discriminatorily denying reemployment):

> In claiming * * * that certain factors were present which would have precluded some employees from reemployment even in the absence of the illegal condition, the [employer] must assume the burden of "disentangling the consequences for which it was chargeable from those from which it was immune." * * * The question is * * * whether the [employer] would have refused employment to these employees entirely apart from the improper practices which we have found were committed. Where two motives for [an action] may have existed, one clearly improper and one a just cause for severance of the employer-employee relationship, and where the improper motive is found to have been present in general, we must require the [employer] to adduce clear and convincing proof that the [adverse action would have been taken] for proper cause entirely apart from illegal considerations.

Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727, 801 (1939), enforced in relevant part, 119 F.2d 903 (8th Cir. 1941), quoting *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir.), cert. denied, 304 U.S. 576 (1938); footnote omitted. See also *Borden Mills, Inc.*, 13 N.L.R.B. 459, 474–475 (1939) (suggesting that it may "constitute a defense to the unfair practice alleged to prove that the discharge would have taken

place without consideration of the [impermissible] cause"); *Salmon & Cowin, Inc.*, 57 N.L.R.B. 845, 846 n.1 (1944), enforced, 148 F.2d 941 (5th Cir. 1945); *Philip Vandernoot*, 64 N.L.R.B. 529, 537 (1945) (footnote omitted) ("[W]e * * * have here two causes, one legal, the other illegal. But unless [the employee] would have been discharged absent the illegal motivation, responsibility remains, and the burden was on the [employer] to disentangle the legal from the illegal."); *Wright-Hibbard Industrial Electric Truck Co.*, 67 N.L.R.B. 897, 908 n.15 (1946); *Robbins Tire & Rubber Co.*, 69 N.L.R.B. 440, 454 n.21 (1946), enforced, 161 F.2d 798 (5th Cir. 1947).

This approach—which is virtually identical to the Board's *Wright Line* test—was criticized by some members of Congress during the deliberations on the Taft-Hartley amendments. See, *e.g.*, H.R. Rep. No. 245, 80th Cong., 1st Sess. 42 (1947). The House passed a version of what became Section 10(c) of the Act, 29 U.S.C. 160(c), that specified the approach adopted by the court of appeals in this case; the House bill forbade the Board from granting relief to a discharged or suspended employee "unless the weight of the evidence shows that such individual was not suspended or discharged for cause" (H.R. 3020, 80th Cong., 1st Sess. § 10(c) (1947)).

Congress, however, rebuffed this effort to alter the Board's rule. The conference committee amended the proposed Section 10(c), deleting the phrase "unless the weight of the evidence shows" and providing simply that the Board could not order relief for an employee who was suspended or discharged "if such individual was suspended or discharged for cause." H.R. Rep. No. 510, 80th Cong., 1st Sess. 13 (1947); see *id.* at 55. This version of Section 10(c) was enacted by Congress, and it remains in force today. Senator Taft, a sponsor of the Taft-Hartley amendments and member of the confer-

ence committee, explained that the purpose of the conference amendment was to reaffirm the Board's existing practice—once an impermissible motive was shown, the employer was to bear the burden of proving that he would have taken the same action for permissible reasons:

> The House language provided that the burden of proof should be on the employee to show that he was not discharged for cause. The Senate conferees took the position that the question was whether he was discharged for cause, and that the burden of proving that cause should be on the employer, because the information is in his hands. So we did not accept the House provision. All this language does is simply to say exactly what the present rule is.
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> * * * * *
>
> [T]here is no intention whatever to change the existing law on this particular question.
>
> * * * * *
>
> The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board.

93 Cong. Rec. 6518–6519 (1947). See also *id.* at 7529 (remarks of Sen. Ball).

In short, Congress specifically endorsed the Board's approach, and the court of appeals has "adopt[ed] by judicial fiat an interpretation that Congress specifically rejected when it enacted the 1947 amendments to the NLRA" (*Jacksonville Bulk Terminals, Inc.* v. *Inter-*

national Longshoremen's Association, No. 80–1045 (June 24, 1982), slip op. 17). See also *North Haven Board of Education* v. *Bell*, No. 80–986 (May 17, 1982), slip op. 16, quoting *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974) (The "deletion of a provision by a Conference Committee 'militates against a judgment that Congress intended a result that it expressly declined to enact.'"). As this Court has recently reiterated, "'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially where Congress has refused to alter the administrative construction.'" *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, No. 80–885 (Dec. 2, 1981), slip op. 7, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The statements of Senator Taft could hardly be more plain: he understood the Board's rule to place the burden of proof on the employer who is shown to have relied on unlawful considerations, and he intended that aspect of the rule—the precise aspect of the *Wright Line* test that was rejected by the court of appeals—to continue in force. See *North Haven Board of Education* v. *Bell*, *supra*, slip op. 14 ("remarks * * * of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction"); *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964). Especially in light of the principle that "if [the Board's] construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute" (*Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979)), the court of appeals' rejection of the Board's *Wright Line* test was, therefore, clearly unwarranted. See *Zurn Industries, Inc.* v. *NLRB*, *supra*.

3. The Board expressly patterned its *Wright Line* test on this Court's decision in *Mt. Healthy City School*

District Board of Education v. *Doyle*, 429 U.S. 274 (1977). See 251 N.L.R.B. at 1083, 1086–1089. In *Mt. Healthy*, a public school teacher was denied tenure for two stated reasons. One reason was that he had engaged in certain constitutionally protected conduct, and the Court held that a school board cannot deny tenure for that reason. 429 U.S. at 283–284. The other stated reason, however, was clearly a legitimate ground for denying tenure. The Court ruled that the burdens of proof should be allocated as follows (*id.* at 287; emphasis added; footnote omitted):

> Initially, * * * the burden was properly placed upon [the employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [School] Board had shown by a *preponderance of the evidence* that it would have reached the same decision as to [the employee's] reemployment even in the absence of the protected conduct.

See also *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270–271 n.21 (1977). In view of the analogy between Section 8(a)(3) cases and cases alleging unconstitutional motivation, and Congress's endorsement of the burden-shifting approach under Section 8(a)(3), the Board was plainly entitled to conclude that "the *Mt. Healthy* procedure * * * serv[es] to effectuate the policies and objectives of Section 8(a)(3)" (*Wright Line, a Division of Wright Line, Inc.*, *supra*, 251 N.L.R.B. at 1088–1089).

Apparently, the court of appeals thought *Mt. Healthy* inapposite because in that case the employer conceded that his action was prompted partly by the

employee's protected activity, while here respondent denied any such motivation. See *NLRB* v. *Wright Line*, *supra*, 662 F.2d at 906. But the court of appeals suggested no reason for distinguishing between a finding of an improper motivating factor based on an employer's admission and a finding based on contested evidence. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 270–271 n. 21 (*Mt. Healthy* approach adopted in case involving contested motivation).

The court of appeals also relied (662 F.2d at 907) on *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), which deals with the order of proof in cases alleging intentional employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See also *Behring International, Inc.* v. *NLRB*, *supra*, 675 F.2d at 88–89. But *Burdine* and *Wright Line* involve different issues. *Burdine* describes how a Title VII plaintiff might prove that racial discrimination played a role in the employer's decision (see 450 U.S. at 253, 256); *Wright Line*, like *Mt. Healthy*, deals with the subsequent question of how, once an impermissible factor is shown to have played a role, the defendant might still avoid liability. See *Village of Arlington Heights* v. *Metropolitan Ho[illegible]ng Development Corp.*, *supra*, 429 U.S. at 265–266, [illegible]–271 n.21 ("When there is a proof that a discriminatory purpose has been a motivating factor in the [challenged] decision, * * * judicial deference is no longer justified. * * * Proof that the decision * * * was motivated in part by a racially discriminatory purpose * * * shift[s] to the [decisionmaker] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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